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Supreme Court, U.S.
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In The
Supreme Court of the United States

MANNY LEE KREITENBERG,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a person is compelled to work undercover for the federal government as part of a plea agreement, is the information that he generates privileged from use in a state prosecution?

2. Did the trial court violate the *Kastigar* rule by, after finding that a *Kastigar* hearing was required: (a) putting the burden on the defense to show that the evidence used against petitioner was tainted; (b) failing to require the prosecution to go line by line through the grand jury evidence to show an independent source for the evidence; and (c) refusing to allow the defense to cross-examine the prosecution's witnesses and evidence?

3. Were petitioner's Fifth and Sixth Amendment rights violated when the state court found that the attorney could waive attorney-client privilege without authorization?

4. Does the opinion below violate the *Braverman* rule by allowing multiple conspiracy convictions for one conspiracy?

PARTIES

Manny Lee Kreitenberg	Petitioner
People of the State of California	Respondent

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People v. Kreitenberg, California Supreme Court, S133207 (unpublished)

STATEMENT OF JURISDICTION

The judgment of the California Court of Appeal in case number B144278 was rendered on January 28, 2003. (App. p. 1)

Rehearing was denied, although language in the opinion was changed on February 26, 2003. (App. p. 2)

The California Supreme Court denied review April 23, 2003. (App. p. 3)

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall . . . be deprived of life, liberty or property without due process of law.

2. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense.

3. Section one of the Fourteenth Amendment, United States Constitution, which provides:

> . . . nor shall any state deprive a person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. California Penal Code section 182 provides:

(a) If two or more persons conspire:

(1) To commit any crime.

They are punishable as follows:

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

5. California Penal Code section 550 provides:

(a) It is unlawful to do any of the following, or to said, abet, solicit, or conspire with any person to do any of the following:

> (1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.

STATEMENT OF THE CASE AND FACTS

Procedural Summary

On May 10, 1999, the state filed an amended Indictment alleging that petitioner and others conspired to commit insurance fraud under the general conspiracy statute (Penal Code §§182/550(a)(1)) [Count1]; and that petitioner and others conspired to present false or fraudulent insurance claims, thereby committing seventeen counts of auto insurance fraud (Penal Code §550(a)(1)) [Counts 2-17, 19]. Petitioner pleaded not guilty to all counts.

Petitioner was tried with one co-defendant by the court without a jury. On February 17, 2000, the court convicted petitioner of counts 1, 3-8, 10, 12-16 and 19; and acquitted him on counts 2, 9, 11 and 17.

On May 5, 2000, petitioner filed a motion for a new trial or, alternatively, for a *Kastigar* hearing. *Kastigar v. United States*, 406 U.S. 411 [92 S.Ct. 1653, 32 L.Ed.2d 212] (1972). The Court granted the motion. After what the court called a "hybrid *Kastigar*" hearing, it denied the *Kastigar* motion and a motion for new trial. The trial court sentenced petitioner to state prison for ten years.[1] The court imposed various fines not at issue and direct restitution in the amount of $152,569.

Petitioner timely filed notice of appeal. He is at liberty on $250,000 appeal bond.

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[1] The sentence consists of a five-year aggravated term on count 1 and consecutive terms of one year on five other counts.

On January 28, 2003, the Second District Court of Appeal affirmed the convictions but reversed and remanded a portion of the sentence. (App. p. 1) Each of the federal issues raised in this court were raised at the trial court level, raised in the Court of Appeal briefing, and addressed in the Court of Appeal opinion.

The immunity argument is discussed at pages 6-11 of the appendix. The argument that the trial court violated the *Kastigar* rules is discussed at pages 6-11 of the appendix. The argument relating to Sixth Amendment attorney-client privilege violations is discussed at pages 11-12 and 18 of the appendix. The argument relating to multiple conspiracies is discussed at pages 12-14 of the appendix.

On February 26, 2003, that Court denied petitioner's petition for rehearing but modified the wording of the opinion. (App. p. 18)

On April 23, 2003, the California Supreme Court denied review. (App. p. 19) This Petition follows.

Factual Summary

Petitioner, a former member of the Bar who was suspected of being involved in insurance fraud and income tax evasion by the federal government, operated an insurance adjusting business and a law office in Southern California which handled personal injury cases. From June 1996 until January 1999, as part of a cooperation agreement with the U.S. Attorney's office, petitioner worked with federal law enforcement officers who were investigating crimes related to insurance fraud in the Southern California area, including the intentional staging of automobile accidents. Beginning in September of

1996, as part of petitioner's work for the federal government, he was required to conduct business as usual but report to the federal agents any activity of a criminal nature. He was also required to maintain all files and records he had in his offices or in his control which would in any way assist law enforcement in their investigation. From May 1997 through September 1998, petitioner continued this work and his office was equipped by the F.B.I. with video and audio surveillance equipment to record his undercover cooperation. In that time, he created video and audio tapes of criminal activity, including activity where he appeared to be involved. (App. pp. 3-4)

In June 1997, the Los Angeles Police Department and the county District Attorney's Office began an investigation of petitioner and several others. These agencies ("the state") suspected that petitioner was involved with a conspiracy that staged auto accidents. Petitioner requested permission from the federal authorities to go to work in cooperation with the state, but the F.B.I. refused petitioner's request. (App. p. 4)

In January 1999, petitioner's work ended for the federal authorities. The federal government brought his cooperation to the attention of the federal court as part of the plea bargain. The state then charged petitioner with crimes alleging his involvement in staged accidents occurring before and during petitioner's work with federal authorities. The state used materials petitioner created as part of his undercover work in their pretrial preparation, grand jury presentation and their case in chief at the trial where petitioner was convicted. (App. p. 4)

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, WHEN A PERSON IS COMPELLED TO WORK UNDERCOVER FOR THE FEDERAL GOVERNMENT AS PART OF A PLEA AGREEMENT, THE INFORMATION THAT HE GENERATES IS PRIVILEGED FROM USE IN A STATE PROSECUTION REGARDLESS OF THE TERMS OF THE PLEA AGREEMENT

Petitioner was cooperating and working undercover for the federal government as part of a plea agreement. Much of the undercover work he performed running a law office was unlawful as part of a scheme to allow others to engage in unlawful behavior. In this way, petitioner was like an undercover operator in a federal drug operation. However, when petitioner's federal cooperation ended, the state used evidence from those tapes and other materials prepared for the federal government, first to evaluate the case, then before a grand jury to indict him, then at trial to convict him. (App. pp. 3-4) The courts would never allow a local or state prosecutor to prosecute a federal undercover agent working a drug operation for violating state law during that drug operation; yet, that is precisely what occurred in this case.

The California court of appeal found that petitioner's written agreement with the federal government provided no immunity against state prosecution or use of the materials. Petitioner believes that this decision should be reviewed by this Court. (App. pp. 4, 6, 10-11)

As the federal government spreads its tentacles outward, criminalizing acts that were once the province of the state as well as combating terrorist cells, the issue presented here becomes one of major importance: Whether

federal due process protects someone who is working as a federal undercover agent, and who may be committing criminal offenses at the direction of federal authorities, from the state's using the information created for the federal authorities in a state prosecution.

A. Factual Background

The federal case arose when petitioner received a federal grand jury subpoena from Assistant United States Attorney Alka Sagar in June of 1996 directed at petitioner's alleged involvement in a tax evasion scheme for the tax years 1990 through 1992. Petitioner retained an attorney and began his cooperation with the United States Attorney's Office. This initial cooperation, which spanned approximately August 1996 until April 1997, included interviews with agents from the Criminal Division of the IRS, the United States Attorney's Office. At these meetings under "limited use" immunity, petitioner divulged what he knew about ongoing criminal schemes in the Los Angeles area involving the illegal "capping" of personal injury cases and staged accidents and about chiropractors, doctors and attorneys, including numerous individuals who would later become the targets of the state investigation, who would receive kickbacks, produce false records and process false claims. (App. p. 3)

These meetings resulted in a written plea agreement with the United States Attorney's Office. The agreement required him to plead guilty to the tax evasion for 1990-1992 and to cooperate by working undercover for the federal government. Petitioner was required to engage in clearly illegal activities – paying capping fees, surreptitiously

recording transactions, and submitting fraudulent insurance claims. (App. pp. 3-4)[2]

Petitioner manufactured seventy-four videotapes and twenty audiotapes for the F.B.I. At the agents' direction, Petitioner also maintained extensive written documentary evidence of illegal conduct in many attorney files. Petitioner was in a situation worthy of a story by Kafka: He was working undercover for the federal government, while the state was investigating what he was doing for the federal government. The state knew petitioner was working undercover for the federal authorities and that he was creating tapes and evidence for the F.B.I. and the state was waiting for his federal work to end so that they could charge him with a crime. Petitioner was helpless to do anything about that, because he needed to cooperate with the federal investigation.

In mid-1997, while still creating material for the F.B.I., petitioner was informed by the F.B.I. that the state was conducting an investigation of him and others. Thus, he was creating evidence that would be relevant to the state investigation but his only protection was any immunity that flowed from his federal agreement.

State agents searched petitioner's residence in September of 1998 while petitioner was still working for the federal authorities. Present at that search was, among others, Deputy DA Charney who prosecuted the case below

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[2] Under the agreement, petitioner's failure to do what was required of him would have resulted in the United States Attorney's Office not recommending a sentence reduction and the sentencing court would be told of criminal matters outside the indictment.

and who had been aware of the federal investigations since September, 1997. Seized in the search were the files that petitioner had created and was maintaining pursuant to his obligation with the F.B.I. and confidential memoranda that petitioner had created for his attorney concerning his cooperation in the federal case. (App. p. 6)

State agents then contacted AUSA Sagar. Sagar discussed what she knew of petitioner's cooperation for the federal authorities with the prosecutors from the Los Angeles DA's office. She provided copies of the audio and videotaped material to the state prosecutors.

When presenting their case before the grand jury, the D.A. utilized the files seized at petitioner's home in September of 1998 without advising the grand jurors petitioner was working undercover for the F.B.I. At petitioner's trial, the attorney files seized at his residence and a seized videotape of petitioner engaging in an incriminating conversation were prosecution exhibits. (App. pp. 6, 11-12)

B. Why This Court Should Decide Whether Petitioner Should Have Immunity

The Court of Appeal looked at the four corners of petitioner's agreement with the federal prosecutors and read that it expressly stated that no state or federal prosecuting authority other than the U.S. Attorney's office for the Central District of California was bound by it and found that the Los Angeles District Attorney was not a party and thus could not be bound; it dismissed, without serious discussion, numerous cases cited by petitioner showing that "equitable immunity" should apply. (App. p. 10)

Certiorari should be granted to determine whether as a matter of both equity and federal due process under the Fifth and Fourteenth Amendments, the state court's position is wrong and petitioner's immunity extends to the state for the work he did as a federal agent under the direction of the F.B.I.

The United States Constitution provides a defendant with a Fifth Amendment right against the use or potential use of any compelled information in regard to any criminal exposure he may have at any time, until the privilege is replaced with "immunity." *Hoffman v. United States*, 341 U.S. 479, 486 [71 S.Ct. 814, 95 L.Ed. 1118] (1951). A defendant retains a Fifth Amendment privilege when his testimony would furnish a link in the chain of evidence needed to prosecute him for any crime. *United States v. Vavages*, 151 F.3d 1185, 1191 (9th Cir. 1997). Where a conviction is not yet final, a witness may still assert the privilege as to the subject of that conviction, certainly while an appeal is pending or up until the time to appeal has expired, and probably until the sentence has been completed. *Mitchell v. United States*, 526 U.S. 314, 327 [119 S.Ct. 1307, 143 L.Ed.2d 424] (1999); *United States v. Velasquez*, 141 F.3d 1280, 1282 (8th Cir. 1998). Hardly any conduct by a defendant in pleading guilty to a charge and then testifying to facts surrounding that charge amounts to a waiver. *United States v. Licavoli,* 604 F.2d 613 (9th Cir. 1979). [Voluntary testimony before grand jury does not waive the privilege for trial.]; *Jeffries v. United States,* 215 F.2d 225 (9th Cir. 1954). [Witness who submitted affidavit exonerating defendant and implicating himself in support of new trial motion for that defendant could claim Fifth Amendment if called as a witness at a new trial for defendant]. Thus, petitioner did not waive or lose his Fifth

Amendment privilege following his guilty plea and cooperation agreement with the United States.

To remove this constitutionally created privilege, the government must provide immunity equal to the Fifth Amendment protection it replaces. *Kastigar v. United States, supra,* 406 U.S. at 450-459. In the instant case, the privilege being replaced is the same as use and derivative use immunity; thus, *regardless of the language of petitioner's plea agreement,* he should have use and derivative use immunity for the materials he prepared for, and at the direction of, federal authorities. (See *Id.* at 453)

Federal courts require not merely that evidence be excluded at a trial but also that the person be left in substantially the same position as if he had claimed the privilege. *United States v. Kurzer,* 534 F.2d 511, 516 (2nd Cir. 1976). If a defendant "exchanged" his privilege for immunity from the federal government, that immunity must be both use and derivative use. *Kastigar v. United States, supra,* 406 U.S. 450-459. If his rights were exchanged for immunity, that immunity is binding upon all state courts. *United States v. Velasquez, supra,* 141 F.3d 1280, 1282.

Petitioner possessed a Fifth Amendment privilege when first subpoenaed by the federal grand jury. He then made an agreement to give up the privilege in exchange for immunity. The criminal exposure of which the privilege protected him ran from the tax fraud of 1990-1992 to any conduct leading up to filing of the state charges in 1999. Petitioner's Fifth Amendment privilege was replaced by the immunity given by the federal government. Such a procedure is well recognized by the federal courts [*e.g.*, *United States v. Kilroy,* 27 F.3d 679, 685 (D.C. Cir. 1994)]

[Informal use immunity afforded by an agreement to plead guilty includes derivative use immunity equivalent to that afforded by statute]; see also *United States v. Kristel*, 762 F. Supp. 1100, 1106 (S.D. N.Y. 1991).

The agreement petitioner received in exchange for his privilege was a non-prosecution agreement from the government for matters unrelated to their investigation (tax fraud of 1990-1992), conditioned upon petitioner's working for the government. The United States could not have, once petitioner relied to his detriment and acted upon the promise, turned around and charged petitioner with the "unrelated activity." A defendant who pleads guilty as a result of a plea bargaining agreement has a due process right to enforcement of the agreement. *Santobello v. New York,* 404 U.S. 257, 262 [92 S.Ct. 495, 30 L.Ed.2d 427] (1972); *United States v. Harvey*, 869 F.2d 1439, 1444 (11th Cir. 1989). [Due process requires the courts to enforce government agreements.]

Petitioner's federal plea agreement was the genesis of his work for the federal agents, the evidence of which was used by the state. Under federal law, his plea agreement is analyzed using due process as well as contract principles. [See, *e.g.*, *United States v. Ingram,* 979 F.2d 1179, 1184 (7th Cir. 1992) [noting that "plea agreements ... are 'unique contracts' and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause"]. In *Mabry v. Johnson*, 467 U.S. 504 [104 S.Ct. 2543, 81 L.Ed.2d 437] (1984), Justice Stevens' opinion tied plea agreement analysis to the Due Process Clause. The Supreme Court's decision in *Mabry* stands for the proposition that courts may not analyze plea agreements strictly by contract principles, because

once the defendant has fully performed, his bargain receives constitutional protection under the Due Process Clause.

When government agents make promises to a person in order to induce him to incriminate himself, the government must honor those promises. *United States v. Stevens*, 601 F.2d 1075, 1078 (9th Cir. 1979), citing *Santobello v. New York, supra,* 404 U.S. at 262. To protect the voluntariness of a waiver of Fifth Amendment rights, where a plea, confession, or admission is based on a promise of a plea bargain or immunity, the government must keep its promise. *United States v. Weiss,* 599 F.2d 730, 737 (9th Cir. 1979). A defendant's detrimental reliance entitles him to enforcement of these agreements. *Savage v. United States*, 978 F.2d 1136 (9th Cir. 1992); *United States v. Alvarado-Arriola*, 742 F.2d 1143 (9th Cir. 1984).

Petitioner was covered by immunity from the federal government. What he did was authorized, indeed required of him. What he did would have been illegal without that authority. At the request of the F.B.I., and pursuant to what was required of him under his binding federal plea agreement, he conducted what would have otherwise been illegal business with these people; however, if the federal authorities used the evidence created by petitioner, it would not be against petitioner but against the other person on the tape. He should have the same immunity any federal or state law enforcement agent has when acting in an undercover capacity.

The simplest modicum of fairness dictates that where an accused is protected by derivative use immunity in his dealings with federal authorities, that immunity should apply equally to state authorities in a future prosecution

of the accused.[3] The Fifth and Ninth Circuits have also held that federal immunity protection – prohibiting the use and derivative use of immunized testimony against the witness – applies equally to bar use or derivative use of that testimony in state cases. (See *In Re Grand Jury Proceedings No. 84-4 (Hartman)*, 757 F.2d 1580 (5th Cir. 1985), 1582-83; *In Re Grand Jury Proceedings (Mena)*, 662 F.2d 532, 533-34 (9th Cir. 1981)).

C. Material Petitioner Asserts Was Privileged Was Exploited

A substantial portion of the evidence before the grand jury was the material petitioner claims is privileged. In his opening statement, Deputy DA Charney advised the grand jury, "I would like to put up . . . 'Saundra's referral list.' . . . These were referral slips that were found at Rick Fine's office or Manny Kreitenberg's home. Many of the files that we have were seized at Manny Kreitenberg's home. "These were the files created to support the federal investigation at the federal government's behest.

The grand jury heard testimony about these files, first from an insurance investigator (Joy Pagenkopp), then Detective Peterson of L.A.P.D. Under *Kastigar v. United States, supra,* 406 U.S. at 460-461, such information may

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[3] State authorities can no more use federal immunized testimony than the federal authorities can use state immunized testimony. (*In re Grand Jury Proceedings*, 860 F.2d 11 (2nd Cir. 1988); *Adams v. State of Maryland*, 347 U.S. 179 [74 S.Ct. 442, 98 L.Ed. 608] (1954); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 53 [84 S.Ct. 1594, 12 L.Ed.2d 678] (1964); see *Kastigar v. United States, supra*, 406 U.S. at 456-57.

not be put before the grand jury or the defendant later prosecuted unless the government can show that its evidence or even background information is not tainted by the exposure to the immunized material. See also *United States v. Hubbell*, 530 U.S. 40 [120 S.Ct. 2037, 147 L.Ed.2d 24] (2000).

At the trial of petitioner, the government introduced the material petitioner claims is privileged. The files themselves were admitted as people's exhibits. Prosecution witnesses testified based upon the use of these files. The people also used in their case in chief a videotape petitioner made at the request of the federal government of Benny Moloy, referring to it as "one of the F.B.I. tapes." In closing argument, the prosecution referred extensively to the seized files and the videotape.

D. If Petitioner's Argument Is Correct, The Judgment Would Have To Be Reversed.

Under California law, federal immunity acts as a complete bar to any later use of such information in any court. *People v. Easley*, 46 Cal. 3d 712, 729 fn. 16 [250 Cal.Rptr. 855] (1988). Thus, if the prosecution put federally immunized evidence in front of the grand jury, the conviction has to be reversed. Similarly, under federal law, if incriminating material which was protected by immunity from disclosure was presented to the grand jury, the indictment must be dismissed. *United States v. North*, 910 F.2d 843, 872 (1990 D.C. Cir.), see *Kastigar v. United States, supra*, 406 U.S. at 453; *United States v. Hubbell, supra*, 530 U.S. 27.

E. Conclusion

What happened to petitioner was patently unfair. As part of his plea agreement with the federal government he created some of the evidence used to indict and convict him in state court. Regardless of the limitations written into his formal plea agreement with the federal authorities, he was acting as their agent and as such he should have been immune from state prosecution.

Under similar circumstances, the Supreme Court of Colorado found that a promise not to prosecute in Oklahoma was binding on Colorado. *People v. Fisher*, 657 P. 2d 922 (Colo. 1983). Fisher was arrested in Oklahoma for burglary. He entered into an agreement to make a videotape for the Oklahoma City Police Department. The tape was to be a training tape which detailed how defendant operated – how he chose the residences, what tools he would use, etc. The police of Oklahoma City promised not to use the tape in any criminal proceeding against defendant. Two years later, defendant was arrested and charged with burglary in Colorado. The Colorado prosecutor sought to use the tape at trial. The Colorado Supreme Court affirmed the trial court's suppression of the tape, finding that:

> The People argue that the defendant has no due process right to enforcement [of the agreement not to use the tape] because Detective Cain lacked authority to bind Colorado officials. The appropriate consideration, as we see it, is not the power of an Oklahoma City police officer to bind another state, but, rather, the scope of a defendant's due process right to enforce a governmental promise not to use evidence against him,

> upon which he detrimentally relied in furnishing incriminating information to the police.

(*Id.* at 930.)

Regardless of the exact wording of his federal plea agreement, petitioner, acting as a federal agent and being compelled to create incriminating evidence as part of his federal plea agreement, should not be subject to being prosecuted with that compelled evidence. Certiorari should be granted to examine this important issue.

II. DID THE TRIAL COURT VIOLATE THE *KASTIGAR* RULE BY, AFTER FINDING THAT A *KASTIGAR* HEARING WAS REQUIRED: (a) PUTTING THE BURDEN ON THE DEFENSE TO SHOW THAT THE EVIDENCE USED AGAINST PETITIONER WAS TAINTED; (b) FAILING TO REQUIRE THE PROSECUTION TO GO LINE BY LINE THROUGH THE GRAND JURY EVIDENCE TO SHOW AN INDEPENDENT SOURCE FOR THE EVIDENCE; AND (c) REFUSING TO ALLOW THE DEFENSE TO CROSS-EXAMINE THE PROSECUTION'S WITNESSES?

A. When A *Kastigar* Hearing Is Required

Any immunized information may not be used in trial preparation, or trial and once a defendant makes a prima facie case that such information has been used, he is entitled to a taint hearing. *Kastigar v. United States, supra,* 406 U.S. at 461-462.

Federal courts hold that the "use" immunity provided in plea agreements require *Kastigar* hearings. *United States v. Kilroy, supra,* 27 F.3d 679, 685; *United States v.*

Williams, 809 F.2d 1072, 1081-1082 (5th Cir. 1987); *United States v. Society of Independent Gasoline Marketers,* 624 F.2d 461, 469-474 (4th Cir. 1979); *United States v. Kurzer, supra,* 534 F.2d 511, 513 fn. 3. Someone who works in good faith as an agent with federal law enforcement should expect that courts will construe the protection to be at the very least derivative use immunity. See, *e.g.*, *United States v. Kilroy, supra,* 27 F.3d 679, 685 [informal use immunity afforded by agreement to plead guilty includes derivative use immunity equivalent to that afforded by statute]; *United States v. Kristel, supra,* 762 F. Supp. 1100, 1106 [*Kastigar* applies to testimony given pursuant to an immunity agreement of the sort entered into with a cooperating individual]; *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982) [under self incrimination clause, evidence of guilt induced by oral promise of immunity not to prosecute is compelled and may not be used against defendant].

Possession by the prosecution of confidential attorney-client privileged material is a violation of the petitioner's Sixth Amendment right, his California constitutional right to counsel and the attorney-client privilege. This right is a "fundamental constitutional right, which has been carefully guarded by the courts of this state." *In re James,* 38 Cal.2d 302, 310 [240 P.2d 596] (1952). Taint hearings similar to *Kastigar* hearings are required when the prosecution possesses such information prior to trial. *Shillinger v. Hayworth,* 70 F.3d 1132, 1143 (10th Cir. 1995); *United States v. Levy,* 577 F.2d 200 (3rd Cir. 1978); *United States v. Sindona,* 636 F.2d 792, 805, *cert. denied*, 451 U.S. 912 (1981); *United States v. Valencia*, 541 F.2d 618, 622-23 (6th Cir. 1976); *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980).

The trial court found that a "taint" hearing was necessary to determine whether the prosecution was improperly exposed to the material petitioner created for the federal government. The record below establishes that petitioner was entitled to a taint hearing. Petitioner adequately set forth that information for the trial court, and the court did order a *Kastigar* taint hearing to be held. The hearing, however, did not comply with the mandates of *Kastigar* or federal due process.

B. The Hearing Below Did Not Comply With *Kastigar*

Kastigar held that to enforce the statutory prohibition on any use of the immunized testimony and adequately protect the witness's Fifth Amendment privilege, an immunized witness subsequently prosecuted "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar v. United States, supra*, 406 U.S. at pp. 461-462; *United States v. Hubbell, supra*, 530 U.S. 27. "[I]t imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States, supra,* at 460. The procedural aspects of *Kastigar* are constitutionally mandated. *United States v. North, supra,* 910 F.2d 940.

The hearing in this case violated due process in three ways. First, the burden is upon the government to show an independent source for all of its evidence. *Weatherford v. Bursey*, 429 U.S. 545 [97 S.Ct. 837, 51 L.Ed.2d 30] (1977);

United States v. Montoya, 45 F.3d 1286, 1292 (9th Cir. 1995). *United States v. Hubbell, supra,* 530 U.S. 27 held:

> *Kastigar* requires that respondent's motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena.

(*Id.* at 45)

The trial court clearly misunderstood the requirements for such a hearing. It put the burden on petitioner to show that any material was tainted. When Ms. Sagar had just begun testifying on petitioner's counsel's direct, the court stated – when speaking with petitioner's counsel – "No. It's your hearing, counsel. That's what I am interested in hearing."

Second, at the hearing, the prosecution must show that the accused's immunized statements were not used against him in any way, and that grand jury or trial testimony by its witnesses was not the result of the accused's immunized statements. *Kastigar v. United States, supra*, 406 U.S. at 453. The prosecution's burden includes going *line by line* through it's grand jury and trial evidence to show a *completely independent* source. In *United States v. North, supra,* 910 F.2d 843, 872 the court said as much:

> The convictions are vacated and the case is remanded to the district court. On remand, if the prosecution is to continue, the District Court must hold a *Kastigar* hearing that will inquire into the *content* as well as the *sources* of the

> grand jury and trial witnesses' testimony. That inquiry must proceed witnesses-by-witness; if necessary, it will proceed line-by-line and item-by-item.

In derogation of *Kastigar*, the people put on absolutely no evidence that each grand jury and trial witness was not exposed to the immunized information, or, if they were, that their testimony was still the result of an independent source and not "tainted" by the immunized information. There was no competent evidence that the prosecution's decision to call witnesses was made independently of the improperly seized materials or that their formulation of the questions to ask the witnesses was just as independent.

Finally, the defense must be allowed to cross-examine the people's witnesses. The right to cross-examine the witnesses is fundamental to the hearing under federal due process. *United States v. North, supra,* 920 F.2d at 944. [In conducting a *Kastigar* hearing, the district court may not substitute an in camera review for a hearing in which the defendant is permitted to cross-examine witnesses.]; see *United States v. Cantu,* 185 F.3d 298, 304 (5th Cir. 1999).

In making its ruling on whether the people satisfied their burden, the trial court advised that it considered *the trial testimony* of the state investigators in the case. These witnesses were never questioned or cross-examined on this issue.

The court also accepted a declaration from the deputy district attorney about the initiation of the state prosecution. The subject matter of this declaration was obviously

of paramount importance to a determination of the matter.[4] Petitioner's objection to the consideration of the declaration unless he could cross examine the Deputy DA on the subject matter of the declaration was overruled. Denying petitioner the opportunity to cross examine the declarant worked to deny him the right to a fair determination of the issue.

Certiorari should be granted because the state court opinion below is in conflict with *Kastigar v. United States.*

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE THE EXTENT TO WHICH AN ATTORNEY MAY WAIVE THE ATTORNEY-CLIENT PRIVILEGE WITHOUT EXPRESS AUTHORITY

Petitioner complained that the state had seized copies of memoranda that he had prepared for his attorney detailing his cooperation with federal authorities.[5] The

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[4] In *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973), the Eighth Circuit ruled that the indirect or tangential influence on a prosecutor's thought process from privileged information (immunized state grand jury transcript) improperly obtained and reviewed by the prosecution required a showing that, "prior to the indictment, it was not used in some significant way short of introducing tainted evidence." Such use means "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."

[5] Seized from petitioner's residence were a computer floppy disk containing letters from petitioner to his federal lawyer about his federal case. Also seized were a series of hard copies of letters from the law firm to petitioner, and from petitioner to the law firm. A six page document

(Continued on following page)

material, which was protected by attorney-client privilege as well as the Sixth Amendment was reviewed by the prosecutors before the case was presented to the grand jury, and was presented at trial.

The Court of Appeal held that petitioner had waived his attorney client privilege by "disclosing the communications . . . to federal prosecutors." (App. pp. 11-12) When petitioner pointed out that the privilege is held by the client and it was the attorney who disclosed the information, the court modified the opinion, citing *Klang v. Shell Oil Co.*, 17 Cal. App.3d 933, 938 [95 Cal.Rptr. 265] (1971). (App. p. 18)

Certiorari should be granted to decide the extent to which an attorney may waive the privilege and interfere with a defendant's Fifth and Sixth Amendment rights by disclosing the information to third parties. *Klang* takes the position that an authorized disclosure waives the privilege and that authorization can be inferred from circumstances showing that the attorney did it to benefit the client. (*Id.* at 938) *Klang*, however, relies on a case that does not support *Klang's* position.

Klang relied on the California Supreme Court's opinion fifty years ago in *Solon v. Lichtenstein,* 39 Cal.2d 75 [244 P.2d 907] (1952). *Lichtenstein*, however, was a much different situation. Parisek consulted a lawyer, Sirota, about giving cemetery plots to Parisek's daughter in exchange for her maintaining them. Sirota told the

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entitled "summary of cooperation" which detailed all of petitioner's work with the F.B.I. was also seized. (App. pp. 4, 6-7, 11-12)

daughter about the statement after Parisek died. At a suit involving the estate, daughter wanted to call Parisek but the other side successfully objected on attorney-client privilege grounds. The Court reversed because Parisek "intended the instructions . . . be conveyed by Mr. Sirota to [daughter]." *Id.* at 79. There is no discussion about the authorization being inferred from circumstances. The authorization appears to be direct. That gloss was applied by the *Klang* court in the context of a dead testator and in the context of summary judgment which is disfavored. It is bad public policy when applied to a criminal case where the actions of the attorney were not explicitly sanctioned by the client.

Certiorari should be granted to examine this important issue.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE STATE COURT OPINION VIOLATES THE *BRAVERMAN* RULE THAT WHERE THERE IS ONE CONSPIRATORIAL AGREEMENT, A DEFENDANT MAY NOT BE CONVICTED OF MULTIPLE CONSPIRACY OFFENSES

As indicated by Count One, a conspiracy offense covering all of the criminal activities in this case, the prosecution sought to prove a single conspiracy underlying all of the alleged crimes. Despite the presence of only one conspiratorial agreement, petitioner was convicted of ten conspiracy violations of Penal Code section 550(a)(1) and one conspiracy violation of Penal Code section 182. Review should be granted because these multiple convictions violate the *Braverman* rule. *Braverman v. United States*, 317 U.S. 49 [63 S.Ct. 99, 87 L.Ed. 23] (1942).

A. Material Developments In The Trial Court Proceedings

Count One charged petitioner and eight named co-conspirators, under Penal Code section 182, with conspiring to violate Section 550(a)(1). The subsequent eighteen counts charged petitioner and various combinations of the eight co-conspirators with violating Penal Code section 550(a)(1) by aiding, abetting, soliciting *and conspiring* to present false and fraudulent insurance claims.

B. A Single Agreement To Commit Multiple Offenses Establishes Only One Conspiracy

This Court's decision in *Braverman v. United States*, *supra*, 317 U.S. 49, established the rule of American conspiracy law that one agreement with multiple objectives, each of which is a separate offense, constitutes only one conspiracy which can only be punished once. *Id.* at 53. *Braverman* condemned the practice of charging multiple conspiracies for one agreement violating several statutes (*Ibid.*; see, *e.g.*, *United States v. Campanale*, 518 F.2d 352, 357-358 (9th Cir. 1975); *United States v. Noah*, 475 F.2d 688, 693 (9th Cir. 1973) [conspiracies charged with different dates were effectively one conspiracy].)

The prosecution evidence in this case established that all of the illegal activities had the single objective of filing false insurance claims after staging automobile accidents. The evidence showed only one overall scheme and thus only one conspiracy.

Review should be granted to secure uniformity of decision because the opinion below violates Due Process under the Fifth and Fourteenth Amendments, under

California law, and the opinion is in conflict with both *Braverman* and the law in this state.

V. CONCLUSION

For the reasons given above, this Court should grant certiorari.

Dated: July 22, 2003

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

MANNY LEE KREITENBERG,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The
State Of California, Second Appellate District

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MANNY LEE KREITENBERG, Defendant and Appellant.	B144278 (Super. Ct. No. BA 109874) (Filed Jan. 28, 2003)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Affirmed in part and reversed in part with directions.

Andrew E. Rubin, Terrence V. Scott and Daniel G. Davis for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

Manny Lee Kreitenberg appeals a judgment convicting him of one count of conspiracy (Pen. Code, § 182)[1] and 13 counts of insurance fraud (§ 550, subd. (a)(1)). He contends (1) the prosecutor improperly presented to the grand jury evidence produced under a grant of immunity, so the indictment must be dismissed and the judgment reversed; (2) he is entitled to a new trial for the same reason; (3) the case should be remanded for a *Kastigar* hearing to determine whether the evidence presented at trial was derived from materials produced under a grant of immunity; (4) the case should be remanded for a *Kastigar* hearing to determine whether the evidence presented at trial was derived from attorney-client privileged materials; (5) the specific conspiracy provision of section 550 prevails over the general conspiracy provision of section 182, so he cannot be convicted under both statutes and his conviction for violation of section 182 must be reversed; (6) the evidence establishes only a single conspiracy agreement and does not support his conviction for several separate conspiracies; (7) the objective of the conspiracy for which he was convicted under section 182 was the commission of the same acts of insurance fraud for which he was convicted under section 550, so it was error to impose a separate sentence for conspiracy; (8) the acts of insurance fraud for which he was convicted under section 550 constitute a single offense, so it was error to impose separate sentences for each insurance fraud count; and (9) the abstract of judgment does not conform to the trial court's oral pronouncement of judgment.

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[1] All statutory references are to the Penal Code unless otherwise specified.

We reverse the judgment in part and remand the case with directions to determine whether the sentence for count 3 is concurrent or consecutive. We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Kreitenberg opened a law office in 1985. He hired office "administrators" who worked with cappers, and he paid the cappers for bringing in personal injury cases. Most of the claims involved automobile collisions and were settled with insurance companies. He directed overflow business to his cousin who also was an attorney. Kreitenberg resigned from the state bar in 1994 while an investigation was pending relating to misuse of his client trust account, but continued to operate the law office and continued to use cappers.

Federal authorities informed Kreitenberg of their criminal investigation in September 1996. Kreitenberg and the United States Attorney for the Central District of California executed a plea agreement in April 1997. Under the agreement, Kreitenberg agreed to plead guilty to one count of conspiracy to defraud the United States (18 U.S.C. § 371) for participating in his cousin's diversion of taxable income from his cousin's client trust account for years 1990 and 1991. Kreitenberg also agreed to cooperate with federal authorities. The U.S. Attorney agreed not to prosecute Kreitenberg for tax evasion for the years 1990 through 1992, for filing false income tax returns for those years, or for paying referral fees and receiving kickbacks in connection with his law office or his cousin's law office in those years. The U.S. Attorney expressly reserved the

right to prosecute Kreitenberg for any other unlawful conduct, but agreed not to offer in evidence in its case-in-chief or in connection with sentencing any statements made or evidence provided by Kreitenberg under the agreement.

The plea agreement states that it is limited to the office of the U.S. Attorney for the Central District of California and does not bind any other state, local, or federal prosecuting authority.

Kreitenberg informed the federal authorities of his criminal activities and identified others who were involved. He also allowed electronic surveillance of his office and gave them access to his files. He sent a letter to his attorney periodically describing his activities, and his attorney would forward the letter to federal prosecutors.

State authorities also investigated Kreitenberg. He informed them that he was working with the Federal Bureau of Investigation and offered to cooperate with state authorities as well. When he informed the FBI of his contact with state authorities, the FBI told him that he could not serve as an informant for state authorities while serving as an informant for the FBI.

2. *The Indictment*

A state grand jury indicted Kreitenberg and others in February 1999. An amended indictment filed in April 1999 charged Kreitenberg with one count of conspiracy (§ 182) to commit the crime of insurance fraud (§ 550, subd. (a)(1)), occurring between May 1995 and February 1998, and 17 counts of insurance fraud (§ 550, subd. (a)(1)) by

presenting fraudulent insurance claims, occurring between various dates within that same time period.

3. *Trial Court Proceedings*

Kreitenberg and the People waived the right to a jury trial, and he was tried by the court.

Witnesses described a law office with a large volume of personal injury cases involving rear-end collisions, where clerical office workers or administrators were paid for the cases that they brought in through cappers. Kreitenberg admitted that he paid cappers and received kickbacks from doctors.

Some cappers consistently brought in cases involving rear-end collisions at the same location. The collisions were staged by drivers and passengers who would stop short in front of cars exiting the Santa Monica Freeway and assume false identities for purposes of the insurance claims. Two cappers in particular consistently presented such cases, sometimes as many as two per day. They would appear in Kreitenberg's office with identification cards for the purported victims or sometimes only names written on a piece of paper, and an administrator would record the information. At first there were three people in the rear-ended vehicle, but they later changed the arrangement to two people to avoid arousing suspicion. If the insurance company's special investigations unit became involved, Kreitenberg instructed his staff to drop the case. Kreitenberg used an alias when dealing with insurance companies, calling himself Alan Anderson or Marty Freed.

The trial court found Kreitenberg guilty of conspiracy and 13 counts of insurance fraud.

Kreitenberg moved for a new trial or in the alternative for a hearing pursuant to *Kastigar v. United States* (1972) 406 U.S. 441. He argued that the federal prosecutor had granted him immunity from prosecution using information provided by Kreitenberg under the federal plea agreement. Kreitenberg maintained that he was entitled to either a new trial or a hearing to determine whether the district attorney's evidence was derived from sources independent of the federally immunized evidence.

Kreitenberg later supplemented the motion, arguing that state investigators had obtained under a search warrant his correspondence with his defense attorney in the federal case and records describing his work "on behalf of the federal government." He argued that those records were protected by the attorney-client privilege and the Sixth Amendment right to counsel, and argued that he was entitled to a *Kastigar* hearing to determine whether the district attorney had used those documents in this prosecution.

The trial court granted the request for a *Kastigar* hearing to address both the immunity and attorney-client privilege issues. The court later characterized the hearing as a "hybrid" rather than a true *Kastigar* hearing, and Kreitenberg's counsel agreed.

At the time of the hearing, the court heard testimony by a federal prosecutor and considered declarations filed by both parties. The defense declined to present any witnesses. The court concluded that the federal plea agreement did not provide immunity from state prosecution or prohibit the use of evidence by state prosecutors. It concluded further that Kreitenberg waived the attorney-client privilege pertaining to documents by disclosing the

documents to federal prosecutors and that in any event the disclosure of privileged documents did not taint the prosecution.

CONTENTIONS

Kreitenberg contends (1) the prosecutor improperly presented to the grand jury evidence produced under a grant of immunity, so the indictment must be dismissed and the judgment reversed; (2) he is entitled to a new trial for the same reason; (3) the case should be remanded for a *Kastigar* hearing to determine whether the evidence presented at trial was derived from materials produced under a grant of immunity; (4) the case should be remanded for a *Kastigar* hearing to determine whether the evidence presented at trial was derived from attorney-client privileged materials; (5) the specific conspiracy provision of section 550 prevails over the general conspiracy provision of section 182, so he cannot be convicted under both statutes and his conviction for violation of section 182 must be reversed; (6) the evidence establishes only a single conspiracy agreement and does not support his conviction for several separate conspiracies; (7) the objective of the conspiracy for which he was convicted under section 182 was the commission of the same acts of insurance fraud for which he was convicted under section 550, so it was error to impose a separate sentence for conspiracy; (8) the acts of insurance fraud for which he was convicted under section 550 constitute a single offense, so it was error to impose separate sentences for each insurance fraud count; and (9) the abstract of judgment does not conform to the trial court's oral pronouncement of judgment.

DISCUSSION

1. *The Federal Plea Agreement Does Not Prohibit State Prosecutors from Using Evidence that Kreitenberg Produced in Cooperation with Federal Prosecutors*

California and federal "immunity statutes" provide that a witness who invokes the Fifth Amendment privilege against self-incrimination can be compelled to testify if, upon the prosecutor's request, the court grants the witness immunity from prosecution based on the compelled testimony. (Pen. Code, § 1324; 18 U.S.C. §§ 6002, 6003.) When a witness is compelled to testify under a grant of immunity, the compelled testimony and other information provided and information derived from the testimony and information provided cannot be used against the witness in any criminal prosecution, excepting only prosecution for perjury or failure to comply with the order to testify. (Pen. Code, § 1324; 18 U.S.C. § 6002; *Kastigar v. United States, supra,* 406 U.S. at pp. 458-459.)

The United States Supreme Court in *Kastigar v. United States, supra,* 406 U.S. 441 held that the scope of immunity granted under an immunity statute must be coextensive with the scope of the Fifth Amendment privilege against self-incrimination to justify supplanting the privilege and compelling a witness to testify. (*Kastigar,* at pp. 449, 459.) The court held that immunity from use and derivative use affords the same protection as the privilege by assuring that the compelled testimony cannot lead to criminal penalties, and therefore is sufficient to compel testimony when a witness invokes the privilege. (*Id.* at pp. 453, 461.) The court held further that once a defendant shows that his testimony on matters related to the present prosecution was compelled by a grant of immunity, the

prosecution must show that the evidence it proposes to use was derived from sources wholly independent of the compelled testimony. (*Id.* at p. 460.) A hearing where the prosecution must show that its evidence was derived from independent sources is known as a *Kastigar* hearing. (See, e.g., *U.S. v. Anderson* (9th Cir. 1996) 79 F.3d 1522, 1526.)

Kastigar v. United States, supra, 406 U.S. 441 involved witnesses who asserted the privilege against self-incrimination and were compelled to testify under a grant of immunity. (*Id.* at p. 442.) The *Kastigar* rationale does not apply where the witness testified voluntarily in exchange for an agreement not to prosecute and was not compelled to testify. In these circumstances, the scope of immunity from prosecution, if any, is determined not by the scope of the Fifth Amendment privilege but by the terms of the agreement not to prosecute. (*Taylor v. Singletary* (11th. Cir. 1998) 148 F.3d 1276, 1283-1284 & fn. 7; *U.S. v. Roberson* (5th Cir. 1989) 872 F.2d 597, 611-612; see *U.S. v. Fuzer* (7th Cir. 1994) 18 F.3d 517, 520.) A witness who agrees to cooperate with prosecutors and provides testimony or other evidence without asserting the privilege against self-incrimination waives the privilege and cannot claim later that he is entitled to immunity to protect his Fifth Amendment rights. (*Taylor,* at p. 1283, fn. 7; *U.S. v. Anderson, supra,* 79 F.3d at p. 1527.)

Griego v. Superior Court (2000) 80 Cal.App.4th 568 held that the People were bound by the district attorney's agreement not to criminally prosecute an alleged sexually violent predator in exchange for his deposition testimony in a civil commitment proceeding. The court concluded that although there was no order compelling testimony under section 1324, the district attorney expressly agreed to provide transactional immunity. (*Griego,* at p. 575.) The

court enforced the broad immunity agreement by holding that the criminal prosecution was barred because the alleged crimes related to matters testified to at the deposition and therefore protected by the agreed transactional immunity. (*Id.* at pp. 575-577.) Although language in the opinion appears to suggest that immunity provided under an agreement not to prosecute where there is no court order compelling testimony under section 1324 must be as broad as immunity that would be provided under section 1324 (*Griego,* at p. 573), the court did not so hold. Rather, the court enforced an express immunity agreement that provided broader immunity than that required under section 1324. (*Griego,* at pp. 576-577.)

The plea agreement here states that the United States Attorney for the Central District of California agrees not to use in its case-in-chief or for the purpose of sentencing, in any prosecution by that office against Kreitenberg, evidence produced by Kreitenberg under the agreement. The agreement does not purport to prohibit use of the evidence by state prosecutors. Moreover, the agreement expressly states that no other federal or state prosecuting authority is bound by the agreement. (See *Taylor v. Singletary, supra,* 148 F.3d. at p. 1284.) The district attorney is not a party to the agreement and therefore cannot be bound by the agreement in any event. (*U.S. v. Roberson, supra,* 872 F.2d at p. 611; see *U.S. v. Fuzer, supra,* 18 F.3d at p. 520.) Cases holding that a defendant is entitled to enforce an agreement not to prosecute under the doctrine of "equitable immunity" (e.g., *Rowe v. Griffin* (11th Cir. 1982) 676 F.2d 524, 526-528; *People v. Fisher* (Colo.1983) 657 P.2d 922, 925, 927) are not on point.

We conclude that the federal plea agreement does not prevent the district attorney from using evidence produced

by Kreitenberg under the agreement. Kreitenberg is not entitled to a *Kastigar* hearing because he has not shown that he was compelled to produce evidence under a grant of immunity from state prosecution. We therefore reject Kreitenberg's first three contentions.

2. *Kreitenberg Waived the Attorney-Client Privilege*

Evidence Code section 912 states that the attorney-client privilege is waived if the privilege holder discloses a significant part of the communication to a third party, unless disclosure to the third party is in confidence and is reasonably necessary to accomplish the purpose of the attorney-client communication.[2] To the extent that Kreitenberg's communications with his attorney constituted consultations concerning compliance with his obligations under the plea agreement, as he apparently contends, the subsequent disclosure of those same letters to federal prosecutors was not reasonably necessary to the attorney consultations. Similarly, the information in the "summary of cooperation" document describing Kreitenberg's disclosures

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[2] "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to . . . the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Evid. Code, § 912, subd. (a).)

"A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) . . . , when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege." (Evid. Code, § 912, subd. (d).)

to federal prosecutors was disclosed to federal prosecutors, so any privilege was waived.

We therefore conclude that Kreitenberg waived the privilege by disclosing the communications or a substantial part of the communications to federal prosecutors.

3. *Kreitenberg was Not Convicted of Multiple Conspiracies*

Section 550, subdivision (a) states that it is unlawful "to aid, abet, solicit, or conspire with any person" to knowingly present a fraudulent insurance claim or commit other proscribed acts. Although the statute describes the prohibited conduct in the disjunctive, the complaint must allege the conduct in the conjunctive to avoid uncertainty, and the trier of fact can convict the defendant if the evidence proves any of the alleged acts. (*In re Bushman* (1970) 1 Cal.3d 767, 775, disapproved on another point in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) Kreitenberg has not shown that there is no substantial evidence to support the convictions on the section 550 counts as offenses other than conspiracies, and he concedes that the prosecution sought to prove only a single conspiracy under section 182 and did not prosecute the section 550 violations as conspiracies.

For these reasons, we reject the contentions that Kreitenberg was charged with and convicted of a separate conspiracy for each count alleged under section 550, subdivision (a) (contention 6) and that he was convicted of the same conspiracy under both the general conspiracy provision of section 182 and the specific conspiracy provision of section 550 (contention 5).

4. *The Trial Court Properly Imposed Separate Sentences for Separate Crimes*

Section 654, subdivision (a) prohibits multiple punishments for the same "act or omission."[3] An indivisible course of conduct is considered a single act or omission under the statute. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*)

The question whether the defendant had the same objective in committing more than one offense is a question of fact unless the undisputed facts support only one conclusion as a matter of law. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) The fact that crimes are similar, related, part of the same course of conduct, or committed pursuant to the same conspiracy does not compel the conclusion that the crimes share a common objective and therefore are part of the same indivisible course of conduct. Rather, a conspiracy or course of conduct can encompass multiple criminal objectives that are not merely incidental to one another. (*In re Romano* (1966) 64 Cal.2d 826, 828; *People v. Akins*

[3] "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).)

(1997) 56 Cal.App.4th 331, 338-340; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212, 1216.)

A conspiracy to commit several crimes is indivisible from the crimes themselves and constitutes the same act or omission as those crimes for purposes of section 654 if and only if the conspiracy had no objective apart from commission of those crimes. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181.) If the objectives of the conspiracy were broader than or different from commission of the crimes for which the defendant is convicted, the defendant can be sentenced both for conspiracy and for those other crimes. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 571.) This can occur where the objective of the conspiracy was to commit several crimes and the defendant is convicted of only some of the crimes. (*People v. Scott* (1964) 224 Cal.App.2d 146, 152, cited with approval in *Cruz,* at p. 181; see *People v. Ramirez* (1987) 189 Cal.App.3d 603, 616 ["no double punishment occurs when one is punished for a conspiracy which encompasses a number of acts, only some of which are punished independently as substantive offenses."], disapproved on another point in *People v. Russo* (2001) 25 Cal.4th 1124, 1134.)

We conclude that the objectives of the conspiracy here were broader than the 13 counts of insurance fraud for which Kreitenberg was convicted. The evidence discussed *ante* supports the implied finding that the conspiracy was designed to accomplish not only 13 specific instances of fraud but also to obtain payment for numerous other fraudulent insurance claims.

We also conclude that Kreitenberg acted with a separate criminal objective in committing each instance of insurance fraud for which he was convicted. The evidence

supports the trial court's express finding that Kreitenberg entertained a separate criminal objective as to each fraud victim and each fraud count and that his course of conduct was not indivisible.

5. *The Case Must Be Remanded for Resentencing on Count 3*

The reporter's and clerk's transcripts are in conflict regarding the sentence on count 3. The trial court convicted Kreitenberg of one count of conspiracy (count 1) and 13 counts of insurance fraud (counts 3 through 8, 10, 12 through 16, and 19). According to the reporter's transcript, the oral pronouncement of judgment did not include a sentence on count 3 but included a sentence on count 9, although Kreitenberg was acquitted of count 9. According to the reporter's transcript, the court stated that the total term of imprisonment is 10 years, including 5 years for conspiracy, five consecutive one-year terms for counts 9, 10, 12, 15, and 19, and concurrent terms for "all other counts."

Of course, Kreitenberg cannot be sentenced for count 9, because he was not convicted of that count. (§ 681.)

In contrast to the reporter's transcript, the minute order reflects a sentence for count 3 but not for count 9. It states that Kreitenberg was sentenced to a total term of 10 years, including 5 years for conspiracy, five consecutive one-year terms for counts 3, 10, 12, 15, and 19, and concurrent terms for the remaining specified counts. The abstract of judgment, which is not the judgment and cannot modify the judgment (*People v. Mesa* (1975) 14 Cal.3d 466, 471), also reflects a consecutive sentence on count 3 and no sentence on count 9.

According to Kreitenberg, the omission of count 3 from the list of counts for which the trial court expressly imposed consecutive sentences in the oral pronouncement of judgment indicates that the court intended the sentence for count 3 to be concurrent together with the concurrent sentences for "all other counts." The People contend the court intended to impose a consecutive term for count 3 but either misspoke in referring to count 9 instead of count 3 or was not accurately recorded in the reporter's transcript.

There is no mechanical rule to resolve a conflict in the record of proceedings. We must attempt to harmonize the record if possible. If we cannot harmonize the record, we must determine which part of the record is entitled to greater credence in these circumstances. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) As the People acknowledge, if we still cannot resolve the discrepancy, the appropriate remedy is to reverse in part and remand the case to the trial court for resentencing. (Cf. *In re Ricky H.* (1981) 30 Cal.3d 176, 191-192.)

We can find no objective means to ascertain the trial court's true intention. We therefore reverse the judgment and remand the case for the trial court to determine whether the sentence on count 3 runs concurrently or consecutively.

DISPOSITION

The sentences on counts 3 and 9 are reversed. The case is remanded to the superior court for resentencing on count 3 to determine whether the sentence for count 3 runs concurrently or consecutively to the other sentences. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MANNY LEE KREITENBERG, Defendant and Appellant.	B144278 (Super. Ct. No. BA109874) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT] (Filed Feb. 26, 2003)

THE COURT:

It is ordered that the opinion filed herein on January 28, 2003, is modified as follows:

1. On page 11, line 10, the following language is inserted after the completed sentence: "The client as holder of the privilege (Evid. Code, §§ 953, 954) can waive the privilege through the actions of his attorney if the attorney acts with the client's consent. Consent can be inferred when the attorney acts for the client's benefit, as here. (*Klang v. Shell Oil Co.* (1971) 17 Cal.App.3d 933, 938.)"

There is no change in the judgment.

Appellant's petition for rehearing is denied.

Court of Appeal, Second Appellate District,
Division Three – No. B144278
S114207

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MANNY LEE KREITENBERG, Defendant and Appellant.

(Filed Apr. 23, 2003)

Petition for review DENIED.

GEORGE
Chief Justice